Opinion of the United States Court of Appeals for the Ninth Circuit, filed August 26, 1975

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1142

JAMES MICHAEL TAYLOR and GLORIA JEANE TAYLOR, husband and wife, on behalf of themselves, individually, and on behalf of others who may be members of a class of persons similarly situated,

Plaintiffs-Appellants,

vs.

ST. VINCENT'S HOSPITAL, a Montana Corporation,

Defendant-Appellee.

OPINION

[August 26, 1975]

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

Before: KOELSCH and CARTER, *Circuit Judges*, and SCHNACKE*, *District Judge*.

JAMES M. CARTER, *Circuit Judge*.

The Taylors appeal from the judgment of the district court, sitting without a jury, based upon the stipulated facts which appear in the court's final pre-trial order. We affirm.

In its Opinion, 369 F.Supp. 948 (D. Montana 1973), the court aptly summarized the pertinent facts as follows:

> "St. Vincent's Hospital is a private corporation which operates a hospital facility in Billings, Montana, known as St. Vincent's Hospital. It has done so since May 1, 1972, when it took over the operation of a

* Honorable Robert H. Schnacke, United States District Judge, Northern District of California, sitting by designation.

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hospital from the Sisters of Charity of Leavenworth, also a private corporation, whose members are all members of a religious order of that name. The physical facilities of St. Vincent's Hospital are now and at all times material in this case have been owned by the Sisters of Charity of Leavenworth, a corporation.

"As a private, charitable, non-profit corporation, St. Vincent's Hospital received certain tax benefits from the State of Montana. The Sisters of Charity of Leavenworth, a corporation, when it operated St. Vincent's Hospital, also applied for and received funds under the Hill-Burton Act (42 U.S.C. §§ 291-291(c)) during the years 1956 through 1963.

"Tubal ligation as a sterilization procedure had not, prior to the preliminary injunction issued by this court in this cause, been performed at St. Vincent's hospital because of the interpretation placed upon the publication entitled "Ethical and Religious Directives for Catholic Hospitals" which is incorporated by reference in the By-laws of the medical staff of St. Vincent's Hospital. The Bishop of Eastern Montana of the Roman Catholic Church has the responsibility to interpret the directives for members of the Church of Eastern Montana, including members of the congregation of the Sisters of Charity of Leavenworth who are on the Board of Directors or are employed at St. Vincent's Hospital. The Preamble in the "Ethical and Religious Directives" makes it clear that they are based upon moral convictions.

"St. Vincent's Hospital and Billings Deaconess Hospital are the only hospitals in Billings, Montana. In June, 1972, the maternity departments of the two hospitals were combined in St. Vincent's Hospital, and an intensive care nursery was constructed in St. Vincent's Hospital in order to reduce infant mortality in the community and to reduce the cost to the commu-

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nity of duplicated maternity services. Prior to approving consolidation of maternity services at St. Vincent's Hospital, the Trustees of Sisters of Charity of Leavenworth advised local obstetricians and trustees of the Billings Deaconess Hospital that surgical sterilizations would not be allowed at St. Vincent's Hospital. The consolidation was completed and the combined maternity department with intensive care facilities opened in June, 1972.

"The plaintiffs, James and Gloria Taylor, are a married couple who were expecting a second child to be delivered by Caesarian [sic] section on October 31, 1972. The couple decided that they wished Mrs. Taylor to be sterilized by tubal ligation at the time of the Caesarian [sic] section and requested permission of St. Vincent's Hospital for the procedure. Permission was denied." *Id.* at 949.

Initially, the district court issued an injunction allowing Mrs. Taylor to have a tubal ligation with the cesarean section, and found that the hospital had acted "under color of state law" (42 U.S.C. § 1983) by virtue of its advantageous state tax position and receipt of Hill-Burton Act funds, *supra.* However, on June 18, 1973, the "Church Amendment (§ 401(b)) of the Health Programs Extension Act of 1973, P.L. 93-45, 87 Stat. 91, was signed into law.[1]

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[1] In pertinent part the "Church Amendment" provides:
". . .

Sec. 401(b). The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Service and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require . . . (2) such entity to——

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of

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Finding that "[b]y its plain language, the Act prohibits any court from finding that a hospital which receives Hill-Burton funds is acting under color of state law," the court dissolved its prior injunction and denied all relief. This appeal ensued.

First, despite the fact that Mrs. Taylor has already had the tubal ligation performed, this case is not moot because of its class action nature. *See Sosna* v. *Iowa,* —— U.S. ——, 43 U.S.L.W. 4125, 4127-4129 (January 14, 1975).

Second, virtually all of the issues raised by this appeal have recently been resolved adversely to appellants by another panel of this court. *Chrisman* v. *Sisters of St. Joseph of Peace,* 506 F.2d 308 (9 Cir. 1974). With respect to those issues relevant to the present case, *Chrisman* held that:

I. The Church Amendment (§ 401(b)) properly permits denominational hospitals to refuse to perform sterilizations. 506 F.2d at 310-312.

II. Section 401(b) is not an impermissible legislative limitation upon judicial power, *id.* at 311, nor does it violate the Establishment Clause of the First Amendment. *Id.*

III. If the hospital's refusal to perform sterilization infringes upon any constitutionally cognizable right to privacy, such infringement is outweighed by the need to protect the freedom of religion of denominational hospitals "with religious or moral scruples against sterilizations and abortions." *Id.* at 312. *See Doe* v. *Bolton,* 410 U.S. 179, 197-198 (1973); *Allen* v. *Sisters of St. Joseph,* 361 F.Supp. 1212 (N.D. Texas 1973), *aff'd,* 490 F.2d 81 (5 Cir. 1974); *Watkins* v. *Mercy Medical Center,* 364 F.Supp. 799 (D.

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such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions . . ."

Idaho 1973); *Doe* v. *Bellin Memorial Hospital,* 479 F.2d 756, 759-760 (7 Cir. 1973) (abortions).

IV. Neither "the enjoyment by the hospital of tax exemptions, its regulation by the state and its performance of a public function" in addition to receipt of Hill-Burton funds, are proper grounds for holding that it acted under color of state law with respect to 42 U.S.C. § 1983. *Chrisman,* 506 F.2d at 312-314.

There is one significant difference between the present case and *Chrisman, supra,* namely, the fact that St. Vincent's Hospital had the only maternity department in Billings, Montana, where the plaintiff could secure a tubal ligation at the time of her cesarean delivery. In *Chrisman* the hospital involved was not the only hospital in Eugene, Oregon, to supply such services. As a result, in *Chrisman,* it was not necessary to consider whether the "state action" might be found from the fact that the hospital was the only one in the area able to supply the services above.

However, the Supreme Court in *Jackson* v. *Metropolitan Edison Company,* —— U.S. —— (43 U.S.L.W. 4110, December 23, 1974), decided about a month after this court decided *Chrisman,* held that private conduct may not be regarded as that of the state unless the state is involved in the specific activity complained of, and that the monopoly status of a private utility company did not in itself or in combination with state regulation and the fact that an essential public service was involved, constitute "state action." There the Supreme Court in upholding the district court and the affirmation by the Third Circuit, stated:

> "All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated private utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania

> Public Utilities Commission found permissible under state law. Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for the purposes of the Fourteenth Amendment." (p. ——; 43 U.S. L.W. 4114).

With respect to the argument that "state action" should be found from Metropolitan's monopoly status, the Court said:

> "Petitioner first argues that 'state action' is present because of the monopoly status allegedly conferred upon Metropolitan by the State of Pennsylvania. As a factual matter, it may well be doubted that the State ever granted or guaranteed Metropolitan a monopoly. But assuming that it had, the fact is not determinative in considering whether Metropolitan's termination of service to petitioner was 'state action' for purposes of the Fourteenth Amendment. In *Pollak, supra,* where the Court dealt with the activities of the District of Columbia Transit Company, a congressionally established monopoly, we expressed [expressly] disclaimed reliance on the monopoly status of the transit authority. *Id.*, at 462. Similarly, although certain monopoly aspects were presented in *Moose Lodge No. 107, supra,* we found that the lodge's action was not subject to the provisions of the Fourteenth Amendment. In each of these cases, there was insufficient relationship between the challenged actions of the entities involved and their monopoly status. There is no indication of any greater connection here." (p. ——; 43 U.S.L.W. 4112).

Likewise, in our case, as in *Jackson,* there is "insufficient relationship between the challenged actions of the entity involved and their monopoly status."

In addition, there is even less justification here than in *Jackson* for finding "state action" or color of state law in the operation of St. Vincent's Hospital because of its monopoly status. In *Jackson* the court assumed for the purpose of its decision that Metropolitan's monopoly was state-created and guaranteed. In our case there is not even a suggestion that the State of Montana had anything to do with the fact that St. Vincent's Hospital provided the only complete maternity services in Billings, Montana.

Jackson rejected the contention, also made by plaintiff here, that "state action" was present because the defendant provided "an essential public service" and thus performed a "public function." *Id.* —— (43 U.S.L.W. 4112). The operation of a denominational hospital can no more be held to involve "the exercise by private entity of powers traditionally exclusively reserved to the State," *id.* —— (43 U.S.L.W. 4112) than can the operation of a private electrical utility company.

The question of whether a denominational hospital, which is the only hospital in the community with certain desired facilities, performs a public function for Fourteenth Amendment purposes has been decided by both the Montana Supreme Court and the federal district court in Montana. In *Ham* v. *Holy Rosary Hospital,* 529 P.2d 361 (Montana 1974), on facts identical to those here, except that no Hill-Burton funds had been received, the Supreme Court of Montana adopted an unreported opinion by Chief Judge Russell E. Smith of the United States District Court for the District Montana, holding:

> "There is no significant relationship between the state and the action here sought to be enjoined. . . .
> The fact that Holy Rosary Hospital has a practical, but not state enforced, monopoly in obstetrical service in Miles City does not make its action state action."

Finally, there is serious question as to whether any monopoly actually exists in Billings, Montana, as to cesarean delivery. The record shows that an agreement was entered into between St. Vincent's Hospital and Billings Deaconess Hospital prior to the hearing in the district court providing for a procedure whereby after a woman had been admitted to St. Vincent's Hospital she could be transferred by ambulance approximately two and a half city blocks to Deaconess Hospital where the cesarean section and tubal ligation could be performed and the baby delivered. It provided for the maintenance and transportation of intensive care equipment (a Kreiselman and Armstrong incubator and adapter) to Deaconess Hospital the evening before the scheduled surgery, and the transportation back to St. Vincent's Hospital of the intensive care equipment and newborn child, after surgery.

We hold that state action or action under color of state law was not involved.

Judgment AFFIRMED.

Opinion of the United States District Court for the District of Montana, filed October 26, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Civil No. 1090

JAMES MICHAEL TAYLOR and GLORIA JEANE TAYLOR, husband and wife, on behalf of themselves, individually, and on behalf of others who may be members of a class of persons similarly situated,

Plaintiffs,

vs.

ST. VINCENT'S HOSPITAL, a Montana Corporation,

Defendant.

OPINION AND ORDER

(Filed October 26, 1973)

The parties have agreed that the court may render a decision in this cause without a trial, based upon the stipulated facts which appear in the court's final pre-trial order. Those pertinent facts may be summarized as folows:

St. Vincent's Hospital is a private corporation which operates a hospital facility in Billings, Montana, known as St. Vincent's Hospital. It has done so since May 1, 1972, when it took over the operation of the hospital from the Sisters of Charity of Leavenworth, also a private corporation, whose members are all members of a religious order of that name. The physical facilities of St. Vincent's Hospital are now and at all times material in this case have been owned by the Sisters of Charity of Leavenworth, a corporation.

As a private, charitable, non-profit corporation, St. Vincent's Hospital received certain tax benefits from the State

of Montana. The Sisters of Charity of Leavenworth, a corporation, when it operated St. Vincent's Hospital, also applied for and received funds under the Hill-Burton Act (42 U.S.C. §§ 291-291(c)) during the years 1956 through 1963.

Tubal ligation as a sterilization procedure had not, prior to the preliminary injunction issued by this court in this cause, been performed at St. Vincent's Hospital because of the interpretation placed upon the publication entitled "Ethical and Religious Directives for Catholic Hospitals" which is incorporated by reference in the By-laws of the medical staff of St. Vincent's Hospital. The Bishop of Eastern Montana of the Roman Catholic Church has the responsibility to interpret the directives for members of the Church of Eastern Montana, including members of the congregation of the Sisters of Charity of Leavenworth who are on the Board of Directors or are employed at St. Vincent's Hospital. The Preamble in the "Ethical and Religious Directives" makes it clear that they are based upon moral convictions.

St. Vincent's Hospital and Billings Deaconess Hospital are the only hospitals in Billings, Montana. In June, 1972, the maternity departments of the two hospitals were combined in St. Vincent's Hospital, and an intensive care nursery was constructed in St. Vincent's Hospital in order to reduce infant mortality in the community and to reduce the cost to the community of duplicated maternity services. Prior to approving consolidation of maternity services at St. Vincent's Hospital, the Trustees of Sisters of Charity of Leavenworth advised local obstetricians and trustees of the Billings Deaconess Hospital that surgical sterilizations would not be allowed at St. Vincent's Hospital. The consolidation was completed and the combined maternity department with intensive care facilities opened in June, 1972.

The plaintiffs, James and Gloria Taylor, are a married couple who were expecting a second child to be delivered by Caesarian section on October 31, 1972. The couple decided that they wished Mrs. Taylor to be sterilized by tubal ligation at the time of the Caesarian section and requested permission of St. Vincent's Hospital for the procedure. Permission was denied.

Plaintiffs allege in their complaint that the defendant in refusing to permit Mrs. Taylor to undergo a tubal ligation at the time of her Caesarian delivery infringed certain rights guaranteed to the plaintiff by the United States Constitution. The plaintiffs further allege that the infringement was committed under color of state law. The prayer asked for injunctive relief, not only for the Taylors, but also for "other persons similarly situated in the State of Montana."

The plaintiffs seek to invoke the jurisdiction of this court under the provisions of 42 U.S.C. § 1983 and 28 U.S.C. § 1343. 42 U.S.C. § 1983 reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 1343 reads in pertinent part:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom

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or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; * * *."

Essential to the plaintiffs' invocation of jurisdiction in this cause is that the defendant, in its alleged violation of the plaintiffs' constitutional rights, acted under color of state law. The plaintiffs' assertion that the defendant is acting under the color of state law is grounded primarily on the fact that Hill-Burton grants have been used to defray a portion of the cost of hospital remodeling and construction over the years. In fact, this court, in its order dated October 27, 1972, found jurisdiction in this cause because of the receipt of such funds by the defendant.

However, on June 18, 1973, the President signed into law the Health Programs Extension Act of 1973. Title IV, Section 401, of that Act, provides in part:

> "(b) The receipt of any grant, contract, loan or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act, by any individual or entity does not authorize any court or any public official or other public authority to require * * *
>
> "(2) such entity to—
>
> "(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facility is prohibited by the entity on the basis of religious beliefs or moral conviction . . . ."

Public Law 93-45; 87 Stat. 91, Section 401(b).

By its plain language, this Act prohibits any court from finding that a hospital which receives Hill-Burton funds, is acting under color of state law. The above sections were specifically aimed at such a result as evidenced by the legislative history.[1]

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[1] See H.R. No. 93-227; 1973 U.S.C.C. & A.N. 1953. The latter includes the following language:

"The background for subsection (b) of section 401 of the bill is an injunction issued in November 1972 by the United States District Court for the District of Montana in *Taylor* v. *St. Vincents Hospital*. The court enjoined St. Vincents Hospital, located in Billings, Montana, from prohibiting Mrs. Taylor's physician from performing in that hospital a sterilization procedure on her during the delivery of her baby by Caesarian section.

"The suit to enjoin the hospital was brought under 42 U.S.C. 1983 (which authorizes civil actions for redress of deprivation of civil rights by a person acting under color of law) and 28 U.S.C. 1343 (which grants United States district courts jurisdiction of actions (authorized by another law) to redress deprivation, under color of any State law, of a Constitutional right). In ruling on a motion to dismiss for lack of jurisdiction, the court stated that 'the fact that the defendant [St. Vincents Hospital] is the beneficiary of the receipt of Hill-Burton Act [title VI of the Public Health Service Act] funds is alone sufficient to support an assumption of jurisdiction. . . .' The court also found two other factors (state licensing and tax immunity) that established a connection between the hospital and the State sufficient to support jurisdiction.

"Subsection (b) of 401 would prohibit a court or a public official, such as the Secretary of Health, Education, and Welfare, from using receipt of assistance under the three laws amended by the bill (the Public Health Service Act, the Community Mental Health Centers Act, and the Developmental Disabilities Services and Facilities Construction Act) as a basis for requiring an individual or institution to perform or assist in the performance of sterilization procedures or abortions, if such action would be contrary to religious beliefs or moral conviction.

"In recommending the enactment of this provision, the Committee expresses no opinion as to the validity of the *Taylor* decision."

In a recent memorandum filed in this action, the plaintiffs attack the Constitutionality of Section 401(b). Specifically, the plaintiffs launch a direct attack upon this section as being contrary to the establishment clause of the First Amendment. However, the question of the Constitutionality of that section is not before this court. Furthermore, the case law relied upon by plaintiffs relates to parochial schools and is distinguishable from the instant case.

Nor does Section 401(b) present any question of retroactive application. It simply limits the remedies the court may grant. It can only affect pending and future court proceedings and does not purport to affect cases in which judgments have become final. Moreover, there is nothing in Section 401(b) to suggest that it applies only in situations where receipt of the public funds occurred after the effective date of the Act. To apply Section 401(b) in such a way would produce the bizarre result that hospitals which have received Hill-Burton funds prior to June 18, 1973, could be forced to permit sterilizations, while those which received such funds after June 18, 1973, could not. This was not the Congressional intent.

Furthermore, there can be no doubt that Section 401(b) which restricts the course and power of inferior federal courts is a valid exercise of Congressional power. Under Article III of the Constitution, Congress can establish such inferior courts as it chooses. Its power to create those courts includes the power to invest them with such jurisdiction as it deems appropriate for the public. *Lockerty* v. *Phillips,* 319 U.S. 182, 187 (1943). Further, Congress is free to legislate with respect to remedies the inferior Federal courts may grant. *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240 (1937).

For the foregoing reasons, It Is Hereby Ordered that the plaintiffs be denied all relief.

IT IS FURTHER ORDERED that the preliminary injunctive relief issued by this court on October 27, 1972, is dissolved.

The Clerk of this court is directed to enter judgment accordingly.

Done and dated this 26th day of October, 1973.

/s/ [Illegible]
United States District Judge

Memorandum Opinion and Order
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Civil No. 1090
MEMORANDUM AND ORDER
(CAPTON OMITTED IN PRINTING)
(FILED NOVEMBER 1, 1972)

The defendant has orally moved for dismissal of this cause on the ground that this court lacks jurisdiction. In a previous order this court noted its conclusion that it has jurisdiction. This opinion and order will explain the rationale of that conclusion.

If the allegations of the plaintiff are sufficient to state a claim under 42 USC § 1983, then this court has jurisdiction under 28 USC § 1343, which vests in U.S. District Courts the authority to hear claims of deprivation of civil rights.[1]

§ 1983 allows the commencement of a civil action for redress of the deprivation of civil rights by a person acting "under color of" law. Two questions thus arise concerning the application of the statute: 1) Whether this defendant is a "person" within the meaning of the section; and 2) If so, can it be said to be acting under color of law regarding the conduct which is the subject of the

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[1] 28 USC § 1343 provides in pertinent part:
"The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution . . . or any Act of Congress . . . of the United States.

complaint. Both questions must be answered in the affirmative and therefore the defendant's motion must be denied. To conclude that defendant is a "person" within the contemplation of the act raises no serious objection. Congressional intent necessarily extends to the actions of some entities, including hospitals, as well as those of individuals.[2]

To conclude that the defendant here acts under color of state law is not difficult. The agreement between the defendant and Deaconess Hospital, testified to by the defendant's administrator, renders it the exclusive maternity facility in the area. This unique fact is important to this decision. The agreement narrowly limits the choices available to an expectant mother; it effectively eliminates alternatives. The consequence, in judicial cognizance, and ignoring for the moment events subsequent to the initial agreement, is that there is but one hospital to which the plaintiff could be admitted for the delivery of her child. The defendant, through the volitional act of its directors, has placed itself in this position. Being the singular institution equipped to provide the maternity and post-natal services which the plaintiff seeks, it would enforce a rule prohibiting the performance of surgical sterilization procedures. The constitutional vitality of the rule and its enforcement are the "merits" of this cause; whether the promulgation of the rule and its enforcement are acts done under color of law is the sole question here to be decided.

I conclude that the exclusive public service function of this hospital is sufficiently affected by the general control of state law and regulation and connected sufficiently with federal funds administered by the state to justify a finding that the defendant is acting under color of law for purposes of application of 42 USC § 1983. This conclusion is supported by inquiry into the nature and sources of the funding of the defendant, the nature and extent of supervision

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[2] Hoffman v. Halden, 268 F2d 280 (9 Cir. 1959) Citta v. Delaware Valley Hospital, 313 F.Supp 301 (ED Penn. 1970.)

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and control of institutions such as the defendant expressed in Montana Law, and finally, the existence of a preferred position occupied by hosptials generally under the Montana tax structure.

Initially, I note that the defendant Corporation is the beneficiary of Federal Hill-Burton Act Funds.[3] Although the defendant, as it presently exists, was not the entity receiving the funds, it occupies and uses the facilities of its predecessor which were constructed through the use of the funds. "Hospitals which receive Hill-Burton Act funds are affected with state action, . . ." and therefore are amenable to claim of deprivation of civil rights under § 1983.[4]

Although the fact that the defendant is the beneficiary of the receipt of Hill-Burton Act funds is alone sufficient to support an assumption of jurisdiction here, it is well to note two other connections between the defendant and state law which serve to substantiate the assumption of jurisdiction in this case.

First, the defendant, as a hospital, is granted a tax dispensation under Montana Law.[5] The immunity granted extends to taxes assessible on its physical structure and property. The existence of this status benefit, though it does not confer the authority under which defendant acts,

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[3] The fact of the recipt of the funds was stipulated to by the parties in open court during the hearing on the issuance of an injunction, October 27, 1972.

[4] Chrisman v. Sisters of St. Joseph of Newark, et al., Unpublished memorandum opinion, US District Court for the District of Oregon, dated July 22, 1972. See also: Citta, supra; Simkin v. Moses H. Cone Memorial Hospital, 323 F2d 959 (4 Cir 1963); Sams v. Ohio Valley Gen. Hospital Assoc., 413 F.2d 826 (4 Cir. 1969).

[5] See: Montana Construction, Article XII, § 2; R.C.M. 1947 § 84-202.

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facilitates the operation of the defendant institution, and in connection with the statutory structure next mentioned, presents a pattern of state action required by § 1983. Second, Montana Law provides for strict licensing, regulation and control of hospitals.[6] The defendant can not provide hospital services without a state license, and the license is subject to the continuing control of the state, and requires annual renewal. In fact, a hospital is prohibited from discriminating among patients and from interfering in the doctor-patient relationship.[7]

While not every licensee of a state can reasonably be held to be acting under color of law by virtue of the license, the type of license and the control exercised over the licensee, the taxation exemption, and the agreement here between the hospitals, are circumstances which distinguish the case from the ordinary licensing case, and make it one in which it can fairly be said that defendant acts under color of law.[8] The nature of defendant's business places it in a position not unlike that occupied by a common carrier or public utility. Though it may not always be legally bound to do so, a hospital has a moral obligation in fulfilling its public function to take all who seek its services.

Therefore, I hold that where a hospital in this State is or makes itself the exclusive source of services, and where it benefits from the receipt of Hill-Burton Act funds, it necessarily acts under color of law for purposes of jurisdiction under 42 USC § 1983.[9]

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[6] See: R.C.M. 1947, § 69-5201 et seq.

[7] See: R.C.M. 1947 § 69-5217.

[8] See: Coke v. City of Atlanta, 184 F.Supp. 579 (DC Ga 1960).

[9] The court wishes to make clear that it does not express an opinion as to its jurisdiction of this case had there not been the agreement between the local hospitals. The exclusiveness of

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In conclusion, it must be noted that the plaintiff submitted her case to a panel of the obstetrics staff of defendant hospital. By doing so, she has exhausted the administrative remedy available to appeal the denial of the surgical procedure by the hospital.

IT IS ORDERED that defendant's motion to dismiss for lack of jurisdiction is denied.

Done and dated this 31st day of October, 1972.

/s/ JAMES F. BATTIN
James F. Battin
United States District Judge

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the defendant's facilities weigh heavily here; had plaintiff been able to obtain reasonably alternative services, a different case for jurisdiction would be present. The court holds only that it has jurisdiction of the narrow facts presented by this case.

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Amended Memorandum Opinion and Order
United States District Court

No. 1090

(Caption Omitted in Printing)

AMENDED MEMORANDUM OPINION AND ORDER

(Filed November 1, 1972)

Having heard the evidence presented by both parties and considered their memoranda, the court is convinced that the plaintiffs are entitled to injunctive relief requested.

Initially, the court notes that it has jurisdiction of this case under 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The reason for this conclusion will be more fully elucidated by a subsequent memorandum. At this juncture, it is sufficient to note that the court considers the defendant to be a "person" "acting under color of law" within the meaning of the former statute because of the advantageous position accorded it by this state's tax structure and the benefit it has received by virtue of Hill-Burton funds.

Regarding the prayer for injunctive relief, it is the opinion of the court that plaintiffs have established all of the elements necessary to move it to exercise its discretion by restraining the defendant.

The principal plaintiff is scheduled to undergo a Caesarian section on October 31, 1972. Her consulting obstetrician, Dr. H. C. Kayser, has recommended that she simultaneously undergo a tubal ligation.

Her right to request and undergo this latter procedure, though not definitively presented as a question at the hearing or by brief, is necessarily an element that this court must find present to grant injunctive relief. I am

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convinced that such is a right protected by the Constitution of the United States. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

The defendant denies plaintiff the exercise of this right by its prohibition of sterilization procedures absent serious medical indications. On balance, the detriment caused the defendant by enjoining enforcement of its prohibition is nonexistent. On the other hand, the protocol adopted by defendant to allow the plaintiff to exercise her right, under defendant's terms, would, by the admission of defendant's witness, subject the plaintiff and her child to an additional risk. The magnitude of that risk escapes measure—but the fact that it exists is in itself sufficient to support this conclusion.

Furthermore, the testimony presented today raises grave doubts as to the constitutional validity of the defendant's regulation. Thus, the evidence indicates a probability of plaintiff's success on the merits.

The fact that granting an injunction will do little, if any, harm to defendant, while not granting it will subject the plaintiff and her child to a risk not otherwise present in the delivery of a child, all because of the defendant's regulation, and the grave constitutional doubts surrounding the regulation, leads the court to conclude that the injunction should be granted. Therefore,

It Is Ordered that the defendant, its employees and agents, are hereby enjoined from denying the plaintiff, Gloria Jeane Taylor, and her physician or physicians, the use of defendant's facilities for the performance of a tubal ligation contemporaneously with the Caesarian section scheduled for said plaintiff on the 31st day of October, 1972.

It Is Further Ordered that the defendant, its employees and agents, are enjoined from denying the use of its

facilities to any physician or physicians on its medical staff for the performance of a tubal ligation contemporaneously with a Caesarian section unless the hospital can affirmatively show that for medical reasons a tubal ligation should not be performed under the circumstances.

/s/ JAMES F. BATTIN
James F. Battin
United States District Judge

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